

NO. 48833-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

DEDRIC L. GREER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

---

APPELLANT'S OPENING BRIEF

---

NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711  
nancy@washapp.org

## TABLE OF CONTENTS

A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	1
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	2
D. STATEMENT OF THE CASE .....	4
E. ARGUMENT .....	6
1. Mr. Greer was denied his right to the effective assistance of counsel when his attorney failed to adhere to the terms of the guilty plea, undermined the promised request for leniency, agreed to facially invalid comparability scores, and worked against his client at sentencing .....	6
a. Mr. Greer had the right to effective representation of counsel at all critical stages of the proceedings.....	6
b. Defense counsel abandoned Mr. Greer by undermining his request to withdraw his guilty plea.....	9
c. Defense counsel undermined the plea agreement by encouraging a high end sentence despite promising to recommend a low end sentence when inducing the plea..	12
d. Defense counsel unreasonably stipulated to a higher offender score than legally permissible .....	17
i. Defense counsel unreasonably and prejudicially stipulated to the comparability of a non-existent statute .....	18
ii. Defense counsel unreasonably stipulated to the comparability of a far broader out-of-state conviction	20

e. Mr. Greer was prejudiced by his attorney’s ineffective assistance .....	22
2. The court lacked authority to impose a sentence based on a facially invalid offender score .....	24
3. The court should have appointed a new attorney to assist Mr. Greer when confronted with a request to withdraw a guilty plea prior to sentencing, based on conflict with counsel.....	25
4. No costs should be awarded on appeal in the event Mr. Greer does not substantially prevail .....	26
F. CONCLUSION .....	28

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	16
<i>In re Pers. Restraint of Gardner</i> , 94 Wn.2d 504, 617 P.2d 1001 (1980) .....	25
<i>In re Pers. Restraint of Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002) .....	19, 24
<i>In re Pers. Restraint of Hews</i> , 108 Wn.2d 579, 741 P.2d 983 (1987) ..	13
<i>In re Pers. Restraint of Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005) .....	18, 19, 21
<i>In re Yung-Cheng Tsai</i> , 183 Wn.2d 91, 351 P.3d 138 (2015) .....	7
<i>Richland v. Wakefield</i> , _ Wn.2d _, _P.3d _, 2016 WL 5344247 (Sept. 22, 2016) .....	27, 28
<i>State v. MacDonald</i> , 183 Wn.2d 1, 346 P.3d 748 (2015).....	13
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	6
<i>State v. Sandoval</i> , 171 Wn.2d 163, 249 P.3d 1015 (2011) .....	9, 23
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997) .....	14
<i>State v. Tourtellotte</i> , 88 Wn.2d 579, 564 P.2d 799 (1977) .....	13
<i>State v. Wilson</i> , 170 Wn.2d 682, 244 P.3d 950 (2010).....	24, 25

## Washington Court of Appeals Decisions

<i>State v. Bandura</i> , 85 Wn.App. 87, 931 P.2d 174, <i>rev. denied</i> , 132 Wn.2d 1004 (1997) .....	6
<i>State v. Chavez</i> , 162 Wn.App. 431, 257 P.3d 1114 (2011) .....	10
<i>State v. Davis</i> , 125 Wn.App. 59, 104 P.3d 11 (2004).....	9, 10
<i>State v. Edwards</i> , 171 Wn.App. 379, 294 P.3d 708 (2012).....	14
<i>State v. Harell</i> , 80 Wn.App. 802, 911 P.2d 1034 (1996).....	9, 12, 25, 26
<i>State v. Hendrickson</i> , 81 Wn.App. 397, 914 P.2d 1194 (1996).....	11
<i>State v. McGill</i> , 112 Wn.App. 95, 47 P.3d 173 (2002).....	17
<i>State v. McRae</i> , 96 Wn.App. 298, 979 P.2d 911 (1999).....	13
<i>State v. Saunders</i> , 120 Wn.App. 800, 86 P.3d 232 (2004) .....	17, 22
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612, <i>rev. denied</i> , 185 Wn.2d 1034 (2016) .....	27
<i>State v. Thomas</i> , 135 Wn.App. 474, 144 P.3d 1178 (2006) .....	17

## United States Supreme Court Decisions

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).....	16
<i>Lafler v. Cooper</i> , _U.S. _, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) 7, 8, 9, 14, 23	
<i>Missouri v. Frye</i> , _ U.S. _, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) ..	7, 8, 9, 14

<i>Padilla v. Kentucky</i> , 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010).....	7, 8, 9, 11, 16, 22
<i>Santobello v. New York</i> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).....	13
<i>Spano v. New York</i> , 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6
<i>United States v. Cronic</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	6
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.2d. 2d 140 (1988).....	10

### **Federal Court Decisions**

<i>United States v. Nguyen</i> , 262 F.3d 998 (9 <sup>th</sup> Cir. 2002).....	10
--	----

### **United States Constitution**

Fourteenth Amendment .....	13
Sixth Amendment .....	1, 6, 8, 23, 26

### **Washington Constitution**

Article I, § 3 .....	13
Article I, § 22 .....	6, 26

## **Statutes**

Ark. Code Ann. § 5-14-125 .....	20
Ark. Code Ann. § 5-36-106 .....	19
<i>Laws</i> 2003 .....	25
<i>Laws</i> 2010 .....	19
RCW 46.12.210 .....	19
RCW 46.12.750 .....	4, 19, 25
RCW 9A.44.010 .....	21
RCW 9A.44.050 .....	4, 20, 21

## **Court Rules**

CrR 4.2.....	9
GR 34.....	27

## **Other Authorities**

<i>Criminal Justice Standards, Defense Function</i> , American Bar Association (3d ed.1993) .....	16
NLADA Performance Guidelines for Criminal Defense Representation (1985).....	17

A. INTRODUCTION.

Based on advice from his attorney, Dedric Greer pled guilty with the expectation that his lawyer would ask for a sentence at the low end of the standard range. Before sentencing, Mr. Greer asked to withdraw his plea because of miscommunication and conflict with his lawyer, and because he only acted accidentally, which should have been a defense to the crime. The court denied Mr. Greer's request without further inquiry.

At sentencing, Mr. Greer's lawyer abandoned him. He told the court that Mr. Greer did not deserve the low end of the standard range and had showed no compassion or mercy. He stipulated to an offender score based on out-of-state offenses even though they do not appear facially comparable to valid Washington offenses. Because Mr. Greer was denied his right to effective assistance of counsel for the plea and sentencing proceedings, and received a legally incorrect sentence, he is entitled to remand for an opportunity to withdraw his plea as well as a new sentencing hearing.

B. ASSIGNMENTS OF ERROR.

1. Mr. Greer was denied his right to effective assistance of counsel under the Sixth Amendment and article I, section 22.

2. Mr. Greer did not knowingly, intelligently, and voluntarily enter a guilty plea with an accurate understanding of the sentencing consequences, in violation of the Fourteenth Amendment and article I, section 3.

3. Mr. Greer's sentence was improperly increased based on an incorrect offender score.

4. The court improperly denied Mr. Greer his right to meaningful representation of counsel by refusing to appoint new counsel to assist Mr. Greer with his request to withdraw his guilty plea.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to effective assistance of counsel includes competent representation in negotiating a guilty plea, understanding the consequences of a guilty plea, and advocating for a fair and legally available sentence. Mr. Greer's attorney falsely assured him he could seek a sentence at the low end of the standard range but instead argued to the court that Mr. Greer did not deserve and should not receive a low end sentence; he agreed to a facially invalid and legally incorrect comparability analysis to increase Mr. Greer's offender score, and he did not assist Mr. Greer's effort to withdraw his guilty plea. Did Mr.

Greer receive ineffective assistance of counsel during the plea and sentencing proceedings?

2. A court lacks authority to impose a sentence that uses a facially invalid prior conviction to increase a person's offender score. The court increased Mr. Greer's offender score based on an out-of-state conviction by claiming it was comparable to a Washington offense that had not been enacted at the time of the prior conviction. Did the court improperly increase Mr. Greer's offender score premised on a facially invalid comparability determination?

3. When an accused person asks to withdraw a guilty plea before sentencing based on fundamental flaws that undermine the validity of the plea, the court must appoint independent counsel because the accused has a right to counsel at this stage of proceedings. Despite learning from Mr. Greer that he had a conflict with his attorney for a number of reasons, including his attorney's incorrect legal advice that the defense of accident was unavailable, the court did not appoint counsel or further inquire into Mr. Greer's request to withdraw his plea. Did the court improperly deny Mr. Greer's motion to withdraw his plea without affording him the assistance of counsel?

D. STATEMENT OF THE CASE.

Dedric Greer pled guilty to murder in the second degree. 1RP 11. He entered into a written plea agreement that stated his understanding he may ask the court to impose a sentence of “154 months confinement – low end of the standard range,” while the prosecution would ask for “254 months confinement,” which was the high end of the standard range. CP 19, 21.

He signed a stipulation, along with his attorney and the prosecution, that his offender score consisted of two prior convictions from Arkansas. CP 17. The stipulation states that Mr. Greer’s offender score was three points because one of the two convictions counted as two points. *Id.* According to the sentencing stipulation, one of the prior Arkansas convictions occurred in 2005 and was comparable to RCW 46.12.750. *Id.* The stipulation does not mention that RCW 46.12.750 did not exist in 2005. *Id.*

The sentencing stipulation also said that the second Arkansas conviction from 2014 for “sex aslt 2” was comparable to RCW 9A.44.050(1)(b). CP 17. It does not mention that the Arkansas statute is facially broader than the elements of the purportedly comparable Washington offense or that a similar offense in Washington may not be

a violent felony, so it would not be double counted in the offender score.

At the outset of the sentencing hearing, defense counsel told the court that Mr. Greer would like to withdraw his plea. 2RP 3. Rather than explain the basis of Mr. Greer's request, defense counsel told Mr. Greer he needed to address the court directly. *Id.* Mr. Greer explained that he had a "conflict of interest" with his attorney, who had miscommunicated with him, failed to take actions he requested, and told him he was not permitted to tell the court that he acted accidentally. 2RP 3-4; CP 28. The court rejected the request, telling Mr. Greer he had pled guilty, and did not further inquire into any of his statements that he attorney misadvised him.

During the sentencing proceeding, defense counsel did not ask for a sentence of "154 months confinement," as set forth in the plea agreement. CP 21. Instead, he told the court that Mr. Greer did not deserve the low end of the standard range, he did not know the meaning of mercy, and he had not showed his victim any mercy. 2RP 8-9.

The court imposed the high end of the standard range, as calculated based on an offender score of three. 2RP 11; CP 35. The court also ascertained that Mr. Greer went to the seventh grade in

school, has no financial assets, and has six children to support. 2RP 10-

11.

E. ARGUMENT.

**1. Mr. Greer was denied his right to the effective assistance of counsel when his attorney failed to adhere to the terms of the guilty plea, undermined the promised request for leniency, agreed to facially invalid comparability scores, and worked against his client at sentencing.**

*a. Mr. Greer had the right to effective representation of counsel at all critical stages of the proceedings.*

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *United States v. Cronin*, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6;<sup>1</sup> Const. art I, § 22.<sup>2</sup> Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *rev. denied*, 132 Wn.2d 1004 (1997).

---

<sup>1</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

<sup>2</sup> Article I, section 22 provides, in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

“Representation of a criminal defendant entails certain basic duties.” *Strickland*, 466 U.S. at 688. These duties include “the effective assistance of competent counsel” in “the negotiation of a plea bargain” and the decision of whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364, 373, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010). An attorney’s failure to assist his client with understanding the important consequences of a guilty plea constitutes ineffective assistance of counsel. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 105, 351 P.3d 138 (2015).

Even when an accused person rejects a guilty plea and has a fair trial, the attorney’s misadvice that led the person to choose not to plead guilty constitutes ineffective assistance of counsel. *Lafler v. Cooper*, \_ U.S. \_, 132 S.Ct. 1376, 1384, 1386, 182 L.Ed.2d 398 (2012).

“Anything less” than effective representation during plea bargaining “might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Missouri v. Frye*, \_ U.S. \_, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012) (quoting *inter alia Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

In *Frye*, the defense attorney did not explain another plea bargain offer to his client and those more favorable offers lapsed. 132 S.Ct at 1408. “When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.” *Id.*

In *Lafler*, the defense attorney acted unreasonably and ineffectively by incorrectly explaining the governing law, which encouraged his client to believe he could win at trial based on the attorney’s misrepresentation about the State’s ability to secure a conviction. 132 S.Ct. at 1383. “[T]he performance of respondent’s counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.” *Id.* at 1384.

In *Padilla*, defense counsel urged his client to accept a guilty plea by telling him that he was unlikely to face immigration consequences, but in fact, he pled guilty to a crime that made deportation a near automatic consequence. 559 U.S. at 368. This “false assurance” about the consequences of the conviction constituted deficient performance under the Sixth Amendment. *Id.* at 368-69.

*Lafler, Frye, and Padilla* demonstrate an attorney's obligation to render accurate advice at the plea bargaining stage, because of the importance of this stage of proceedings and because an accused person is entitled to expect the attorney's advice is accurate and complete.

A defense attorney's obligation to explain the consequences of a guilty plea is separate from a court's role in ascertaining the voluntariness of a plea. *State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011). Even if the court explains sentencing consequences to a defendant, defense counsel's advice may undermine or negate that information. *Id.*

*b. Defense counsel abandoned Mr. Greer by undermining his request to withdraw his guilty plea.*

When a defendant asks to withdraw his guilty plea before sentencing, the hearing is a critical stage at which he has the right to assistance of counsel. *State v. Harell*, 80 Wn.App. 802, 804-05, 911 P.2d 1034 (1996); *State v. Davis*, 125 Wn.App. 59, 63-64, 104 P.3d 11 (2004) ("A defendant is entitled to counsel at all critical stages of a criminal prosecution, which includes a motion under CrR 4.2(f) to withdraw a guilty plea."). CrR 4.2(f) provides that a presentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding for

which a defendant has a constitutional right to be represented by counsel. *State v. Chavez*, 162 Wn.App. 431, 439, 257 P.3d 1114 (2011).

Accordingly, Mr. Greer was “entitled to representation by counsel on this motion [to withdraw his plea] because it is an essential stage of his prosecution.” *Davis*, 125 Wn.App. at 68.

Mr. Greer asked to withdraw his plea before he was sentenced. 2RP 3. He explained to the court he had “a conflict of interest” with his assigned attorney. 2RP 3. “A conflict of interest may amount to ineffective assistance of counsel where it adversely affects a client’s interests.” *Chavez*, 162 Wn.App. at 438. When confronted with a reason to believe a conflict exists requiring appointment of a new attorney, the trial court should question the attorney or defendant “privately and in depth” to ascertain the nature of the problem between the lawyer and client. *United States v. Nguyen*, 262 F.3d 998, 1002-03 (9<sup>th</sup> Cir. 2002). While accused persons are not guaranteed the best rapport with their attorneys, they are guaranteed representation by “an effective advocate” with whom they have no irreconcilable conflicts and can communicate. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.2d. 2d 140 (1988). The court did not ask about the conflict of interest or appoint a different attorney.

An attorney's performance is also ineffective when the lawyer does not accurately convey the terms of a plea agreement or its legal consequences. *Padilla*, 559 U.S. at 366-67. Mr. Greer explained there was "miscommunication" and his lawyer had not done things he had asked in the course of the proceedings. 2RP 3. He was upset that his lawyer "wanted me to agree to this crime. And I just can't get up and agree to it, man." 2RP 4. He said his lawyer had told him he could not tell the court what happened or say it was an accident, yet accidentally causing the injury would be a defense to the charged offense of intentional assault with the reckless infliction of bodily harm. 2RP 4; *see State v. Hendrickson*, 81 Wn.App. 397, 399, 914 P.2d 1194 (1996) (an unintentional assault can be excused by accident). If his lawyer had told him accidental acts was not a defense, it would have been incorrect advice about a material element of the crime.

Rather than confer confidentially with Mr. Greer or his lawyer, or appoint new counsel, the judge told him, "Guilty is guilty" and noted he already entered his guilty plea. 2RP 4. The court categorically refused to consider any legal basis to withdraw the guilty plea "unless something exceptional happens at the sentencing." 2RP 5.

The court did not inquire further into Mr. Greer's assertion of a conflict of interest, the work Mr. Greer had asked his attorney to do that his lawyer failed to do, or the apparently incorrect legal advice the attorney gave about an available defense.

Mr. Greer was entitled to effective representation at this stage of the proceedings, but Mr. Greer's assigned attorney refused to assist him. He told Mr. Greer to address the court directly, and said he did not know the basis for Mr. Greer's motion. 2RP 3. After the court denied the motion to withdraw his plea, defense counsel told the court that Mr. Greer has "thought better of his decision today to try to withdraw his plea," undermining Mr. Greer's request without any evidence on the record that Mr. Greer had abandoned his complaints about his attorney or misperceptions about his plea. 2RP 9. Mr. Greer had no assistance of counsel when he told the court that his attorney misadvised and refused to adequately communicate about the guilty plea, which denied him his right to counsel. *Harell*, 80 Wn.App. at 805.

*c. Defense counsel undermined the plea agreement by encouraging a high end sentence despite promising to recommend a low end sentence when inducing the plea.*

An accused person waives bedrock constitutional rights by pleading guilty. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct.

495, 30 L.Ed.2d 427 (1971); *State v. MacDonald*, 183 Wn.2d 1, 8-9, 346 P.3d 748 (2015); U.S. Const. amend. 14; Const. art. I, § 3. Because of the fundamental importance of the rights waived in a guilty plea, constitutional due process requires the parties and court strictly to adhere to the terms of the plea agreement. *MacDonald*, 183 Wn.2d at 8; *Santobello*, 404 U.S. at 260. A decision to plead guilty must be based on an understanding of the charge, “alternative courses of action,” and the sentencing consequences. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 597, 741 P.2d 983 (1987).

In exchange for waiving significant trial rights, an accused person “receives the benefit of the bargain.” *MacDonald*, 183 Wn.2d at 9. When the accused person does not receive the benefit of the bargain, “it ‘undercuts the basis for the waiver of constitutional rights implicit in the plea.’” *Id.* (quoting *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977)).

The attorneys may not contravene “any of the defendant’s reasonable expectations that arise from the agreement.” *State v. McRae*, 96 Wn.App. 298, 305, 979 P.2d 911 (1999). For example, a prosecutor may not explicitly or by conduct show an intent to circumvent the terms of a plea agreement. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d

1199 (1997). Likewise, an attorney may not induce a person to plead guilty, or reject a guilty plea offer, based on inaccurate information. *Lafler*, 132 S.Ct. at 1408; *Frye*, 132 S.Ct. at 1384. Defense “counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty.” *State v. Edwards*, 171 Wn.App. 379, 394, 294 P.3d 708 (2012).

Mr. Greer waived his right to trial and agreed to plead guilty based on an agreement that he would be able to ask the court to impose the low end of the standard range, which was 154 months, while the prosecution would ask for the high end of the standard range, 254 months. CP 21. When entering his guilty plea, the court made sure that Mr. Greer had closely reviewed “every line” of the statement on plea of guilty. 1RP 6. The plea agreement explicitly included Mr. Greer’s understanding that his attorney may ask the court to impose a sentence of “154 months confinement – low end of the standard range.” CP 21.

But rather than fulfill Mr. Greer’s anticipated sentencing recommendation that his attorney would ask for the low end of the standard range, defense counsel told the court, “this is not a low end

case,” it “calls out for a sentence higher than the low end,” and Mr. Greer did not deserve a low end sentence. 2RP 8, 9.

Defense counsel emphasized, “This case was a tragedy. It . . . calls out for a sentence higher than the low end. And I understand that, Your Honor.” 2RP 8. Defense counsel reminded the court that Mr. Greer “should have shown his victim [mercy] and did not.” 2RP 9.

Defense counsel did not ask for a sentence at or close to the low end, or even the middle of the range. Defense counsel started from the State’s high end request and asked for something slightly lower. 2RP 9. Instead of proposing 154 months or a low end term, counsel asked the court to “show him some mercy, some mercy that he should have shown his victim and did not.” 2RP 9.

Not only did defense counsel fail to advocate for the low end sentence that was the premise of the plea bargain, he gave the court reasons to impose a high end sentence and encouraged such a sentence by arguing that Mr. Greer had yet to learn the meaning of mercy or compassion. This sentencing argument undermined Mr. Greer’s expectations when he plead guilty, leaving him without the meaningful request for leniency that he anticipated when he waived his right to trial and agreed to plead guilty, and further demonstrating how defense

counsel essentially abandoned advocating for his client during the sentencing proceeding, despite falsely assuring Mr. Greer he would make a request for a low end sentence when he entered his guilty plea. This misadvice about critical consequences of the plea constitutes ineffective assistance of counsel. *See Padilla*, 559 U.S. at 368-69.

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Professional norms include sentencing advocacy. *Criminal Justice Standards, Defense Function, Standard 4–8.1 Sentencing*, American Bar Association (3d ed.1993) (ABA standards direct counsel to file presentence report or “submit to the court and the prosecutor all favorable information relevant to sentencing”). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel at sentencing “should be prepared” to “advocate fully for the requested sentence and to protect

the client's interest." NLADA Performance Guidelines for Criminal Defense Representation, 8.7 (1985).<sup>3</sup>

Defense counsel did not meaningfully advocate for his client at sentencing, as promised in the plea agreement, demonstrating counsel's deficient performance.

*d. Defense counsel unreasonably stipulated to a higher offender score than legally permissible.*

Defense counsel's obligation to understand the law and accurately explain it to both his client and the court extends to the sentencing consequences of a conviction. *See State v. McGill*, 112 Wn.App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional sentence downward based on multiple offense policy); *see also State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

Under the Sentencing Reform Act, an out-of-state conviction may be included in the offender score only if the prior offense is comparable to a Washington offense. RCW 9.94A.525(3); *see also In*

---

<sup>3</sup> Available at:  
[http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines#eighitone](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#eighitone).

*re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)

(conviction for foreign crime that is broader than analogous

Washington statute may not be counted as a “strike” for purposes of sentencing).

To determine whether a prior out-of-state conviction may be included in a defendant’s offender score, the sentencing court must compare the elements of the foreign crime with the elements of the similar Washington crime. If the statutory elements of a foreign conviction are broader than the elements of a similar Washington statute, “the foreign conviction cannot truly be said to be comparable.” *Lavery*, 154 Wn.2d at 258.

Defense counsel stipulated that Mr. Greer had two prior convictions from Arkansas that were comparable to certain Washington offenses. These stipulations are unreasonable.

*i. Defense counsel unreasonably and prejudicially stipulated to the comparability of a non-existent statute.*

To be comparable, “the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed.” *Lavery*, 154 Wn.2d at 255.

According to the stipulation, Mr. Greer had a 2005 Arkansas conviction for “fel theft by rec.” CP 17. This appears to be shorthand for Arkansas’s felony theft by receiving, codified in Ark. Code Ann. § 5-36-106(e), although the stipulation does not cite any Arkansas statute.

Defense counsel stipulated that this “fel theft by rec” from 2005 was comparable to RCW 46.12.750. CP 17.

But RCW 46.12.750 did not exist in 2005. In 2005, a different version of this statute was codified at RCW 46.12.210, but in 2010, the Legislature both renumbered and substantively altered the statute’s elements and punishment. *Laws* 2010, ch. 161, §319 (effective July 1, 2011) (text of RCW 46.12.750 and former RCW 46.12.210 are attached in Appendix A).

Mr. Greer’s 2005 conviction cannot be comparable to a statute that did not exist at the time the offense was committed. *Lavery*, 154 Wn.2d at 255. Comparability requires comparison of offenses in existence at the time the earlier offense was committed. *Id.*

Consequently, this stipulation is facially invalid. A defendant “cannot waive the legal effect of his prior convictions” and “cannot agree to a sentence in excess of that statutorily authorized.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002). Counsel’s

performance was deficient in agreeing to treat a prior conviction as comparable to a statute that was not in effect at the time of the prior offense.

*ii. Defense counsel unreasonably stipulated to the comparability of a far broader out-of-state conviction.*

Defense counsel stipulated that Mr. Greer's Arkansas conviction for "sex aslt 2" was comparable to "RCW 9A.44.050(1)(b)." CP 17.

In Arkansas, sexual assault in the second degree is defined as any sexual contact with another person, under certain circumstances. Ark. Code Ann. § 5-14-125. Sexual contact is defined as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(10).<sup>4</sup>

The purportedly comparable offense of RCW 9A.44.050(1)(b) is rape in the second degree. To constitute rape in the second degree, the State would have to prove Mr. Greer engaged in "sexual intercourse" under certain circumstances. RCW 9A.44.050(1).

---

<sup>4</sup> Ark. Code Ann. § 5-14-125 and the pertinent definitions are attached in Appendix B.

Although “sexual intercourse” under RCW 9A.44.050 includes some types of sexual contact, it uses a far narrower definition than Arkansas’s definition of sexual contact for its sexual assault offense. Second degree rape’s requirement of sexual intercourse is limited to sexual contact involving sexual organs or penetration of the vagina or anus, while Arkansas’s sexual assault includes touching of a sexual part of the body, not limited to these specific sexual organs. RCW 9A.44.010(1); Ark. Code Ann. § 5-14-101(10).

Because Arkansas uses broader statutory definitions, conduct would violate its provisions but would not be punishable under RCW 9A.44.050(1)(b). If an out-of-state offense is legally broader, a person can be convicted of that offense without having been guilty of the in-state offense, and it is not legally comparable. *Lavery*, 154 Wn.2d at 256. It is also unlikely that it could be factually comparable because the narrower factual elements would have to have been proved beyond a reasonable doubt or specifically admitted, yet the defendant would not have had any basis to contest issues that would not amount to the equivalent offense in Washington, as it would not have been an available defense in the other state. *Id.* at 258. “Where the statutory elements of a foreign conviction are broader than those under a similar

Washington statute, the foreign conviction cannot truly be said to be comparable.” *Id.*

Consequently, the stipulation rests on statutes that contain different terms and it is unreasonable to conclude they were legally or factually comparable. Even if Arkansas’s sexual assault in the second degree could be comparable to a different Washington offense, such as indecent liberties, it would not have been a violent felony that counted as two points in Mr. Greer’s offender score. CP 17. Defense counsel appears to have stipulated to an unavailable and legally incorrect offender score predicated on out-of-state convictions that are not comparable to the agreed offenses based on even cursory legal research.

*e. Mr. Greer was prejudiced by his attorney’s ineffective assistance.*

An attorney’s deficient performance constitutes ineffective assistance of counsel when there is a reasonable probability that, but for counsel’s errors, the outcome would have been different. *Padilla*, 130 S.Ct. at 1485. The different outcome includes the reasonable probability of a different sentence or a decision not to waive trial and plead guilty. *Id.*; see *Saunders*, 120 Wn.App. at 825 (counsel ineffective for failing to raise potentially successful argument regarding same criminal

conduct at sentencing). “This standard of proof is ‘somewhat lower’ than the common ‘preponderance of the evidence’ standard.” *Sandoval*, 171 Wn.2d at 174-75 (quoting *Strickland*, 466 U.S. at 694).

Defense counsel’s errors are palpable in the case at bar and it is reasonably probable that Mr. Greer would not have pled guilty and would have received a lower sentence but for these error. Counsel inexplicably agreed to an increased offender score based on a facially invalid comparability analysis for one offense and a cursory glance at the out-of-state conviction shows far broader elements for the second offense. Counsel abandoned his promise to seek a low end sentence and instead offered the court reasons to impose a sentence close to the high end, while actively discouraging a low end sentence. This sentencing argument occurred despite having expressly induced the guilty plea by creating the expectation that counsel would seek a low end sentence of 154 months. Counsel offered Mr. Greer no help when Mr. Greer wanted to withdraw his plea and then undermined Mr. Greer’s request during his sentencing argument.

Deficient performance during sentencing alone constitutes prejudice under *Strickland* “because any amount of [additional] jail time has Sixth Amendment significance.” *Lafler*, 132 S.Ct. at 1386

(internal citation omitted). But for counsel's deficient performance, Mr. Greer would at least have faced a lower standard range, resulting in a lower sentence even if the court would impose the top of that reduced range. Mr. Greer would have made the decision to plead guilty with an accurate understanding of what kind of sentencing recommendation his attorney would make and would have had an attorney who explained the plea and its consequences in an adequate fashion. The ineffective assistance of counsel entitles Mr. Greer to remand, with the opportunity to receive new counsel, consider whether to withdraw his guilty plea, and receive competent counsel's assistance for further proceedings, including a new sentencing hearing.

**2. The court lacked authority to impose a sentence based on a facially invalid offender score.**

It is "well settled" that "a defendant cannot waive a challenge to a miscalculated offender score" because a court lacks authority to enter "a sentence based on an improperly calculated score." *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010). "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Goodwin*, 146 Wn.2d at 867-68. "[A] defendant cannot waive a challenge to a miscalculated

offender score.” *Id.* at 874. And “a plea bargaining agreement cannot exceed the statutory authority given to the courts.” *In re Pers. Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980) (cited with approval in *Wilson*, 170 Wn.2d at 689).

Mr. Greer’s 2005 prior conviction cannot be comparable to an offense that did not exist in 2005, as explained above. CP 32. The purportedly comparable statute, RCW 46.12.750, was not enacted until 2010. Although a different version of the statute was in effect in 2005, that version contained many substantive differences. *See Laws* 2003, ch. 236.

When a court imposes a sentence that is legally incorrect, the sentence must be vacated and corrected on remand. *Wilson*, 170 Wn.2d 691. Because the court used an incorrect offender score as the premise of its sentencing decision, a new sentencing hearing is required.

**3. The court should have appointed a new attorney to assist Mr. Greer when confronted with a request to withdraw a guilty plea prior to sentencing, based on conflict with counsel.**

Mr. Greer had the constitutional right to counsel at all stages of proceedings, including his request to withdraw his guilty plea. *See Harell*, 80 Wn.App. at 804–05. Mr. Greer’s attorney refused to assist

him with his request, directing him to address the court on his own and leaving him to act pro se during this critical stage of proceedings. 2RP 3.

A denial of the right to counsel is presumed prejudicial. *Harell*, 80 Wn.App. at 805. By declining to assist Mr. Greer, and leaving him to fend for himself, he was denied the right to representation of counsel as guaranteed by the Sixth Amendment and article I, section 22. “An outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis.” *Harell*, 80 Wn.App. at 804–05.

The court should have appointed counsel to represent Mr. Greer, rather than requiring him to represent himself in his request to withdraw his plea based on his prior attorney’s ineffective assistance. On remand, Mr. Greer should be accorded conflict-free counsel and permitted to withdraw his guilty plea.

**4. No costs should be awarded on appeal in the event Mr. Greer does not substantially prevail.**

Mr. Greer told the sentencing court that he “made it to the 7<sup>th</sup> grade” in school; has no assets; owns no car, real estate, or bank account; and has six children to support. 2RP 10-11. He agreed to pay

restitution of \$4900, which will accumulate interest, and was ordered to pay other legal financial obligations. CP 33-34. He meets the requirements for indigency, and after he serves the 254-month sentence imposed, he will not be in a better position to find employment and pay accumulated debts than before his conviction and sentence. *See* Order of Indigency dated April 5, 2016; Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense, filed April 5, 2016.

The presumption of indigency enshrined in RAP 15.2(f) continues unless the State can prove there is good cause to disrespect the trial court's finding. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016). GR 34 guides a court's assessment and requires a finding of indigence for a person whose income falls below 125 percent of the federal poverty guideline. *Richland v. Wakefield*, \_ Wn.2d \_, \_P.3d \_, 2016 WL 5344247, \*4 (Sept. 22, 2016).

An individualized inquiry demonstrates Mr. Greer has no means of financial support, is serving a 254-month prison term for his conviction in this case, has no other resources or assets, and must pay other costs and fees. There is no basis to conclude he will be able to

escape from poverty in the near future. Consequently, in the event he does not prevail on appeal, no costs should be awarded due to his indigence. *See Sinclair*, 192 Wn.App. at 390, 393; *see also Wakefield*, 2016 WL 5344247 at \*4-5.

F. CONCLUSION.

This case should be remanded for further proceedings at which Mr. Greer has effective assistance of counsel and is accorded the opportunity to withdraw his guilty plea and receive a new sentencing hearing if convicted.

DATED this 20<sup>th</sup> day of October 2016.

Respectfully submitted,

s/ Nancy P. Collins  
NANCY P. COLLINS (28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant  
(206) 587-2711  
nancy@washapp.org

## **APPENDIX A**

Ark. Code Ann. § 5–36–106 (2005)

Theft by receiving

(a) A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

(b) For purposes of this section, ‘receiving’ means acquiring possession, control, or title or lending on the security of the property.

(c) The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen.

(d) It is a defense to a prosecution for the offense of theft by receiving that the property is received, retained, or disposed of with the purpose of restoring it to the owner or other person entitled to it.

(e)(1) Theft by receiving is a Class B felony if the value of the property is two thousand five hundred dollars (\$2,500) or more.

(2) Theft by receiving is a Class C felony if:

(A) The value of the property is less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200); or

(B) The property is a credit card or credit card account number; or

(C) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500).

(3) Otherwise, theft by receiving is a Class A misdemeanor.

Former RCW 46.12.210, in effect in 2005:

Any person who knowingly makes any false statement of a material fact, either in his or her application for the certificate of ownership or in any assignment thereof, or who with intent to procure or pass ownership to a vehicle which he or she knows or has reason to believe has been stolen, receives or transfers possession of the same from or to another or who has in his or her possession any vehicle which he or she knows or has reason to believe has been stolen, and who is not an officer of the law engaged at the time in the performance of his or her duty as such officer, is guilty of a class B felony and upon conviction shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than ten years, or both such fine and imprisonment. This provision shall not exclude any other offenses or penalties prescribed by any existing or future law for the larceny or unauthorized taking of a motor vehicle.

## **APPENDIX B**

Ark. Code Ann. § 5-14-125 (2014)

Sexual assault in the second degree

(a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:

(A) Less than fourteen (14) years of age; and

(B) Not the person's spouse;

(4)(A) Engages in sexual contact with a minor and the actor is:

(i) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(ii) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(iii) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to a prosecution;

(5)(A) Being a minor, engages in sexual contact with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse.

(B) It is an affirmative defense to a prosecution under this subdivision (a)(5) that the actor was not more than:

(i) Three (3) years older than the victim if the victim is less than twelve (12) years of age; or

(ii) Four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher, principal, athletic coach, or counselor in a public or private school in a grade kindergarten through twelve (K-12), in a position of trust or authority, and uses his or her position of trust or

authority over the victim to engage in sexual contact with a victim who is:

- (A) A student enrolled in the public or private school; and
  - (B) Less than twenty-one (21) years of age.
- (b)(1) Sexual assault in the second degree is a Class B felony.
- (2) Sexual assault in the second degree is a Class D felony if committed by a minor with another person who is:
- (A) Less than fourteen (14) years of age; and
  - (B) Not the person's spouse.

Ark. Code Ann. § 5-14-101 (2014)

Definitions:

As used in this chapter:

...

(10) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and

(11) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

RCW 9A.44.050(1)(b)

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

...

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

RCW 9A.44.010; Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 48833-7-II
v.	)	
	)	
DEDRIC GREER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] DEDRIC GREER 390059 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF OCTOBER, 2016.

*gt*

X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

**October 20, 2016 - 3:58 PM**

## Transmittal Letter

Document Uploaded: 4-488337-Appellant's Brief.pdf

Case Name: STATE V. DEDRIC GREER

Court of Appeals Case Number: 48833-7

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us